

# EXHIBIT 3

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
Warming Devices Products ) (JNE/FLN)  
Liability Litigation )  
September 8, 2016  
Minneapolis, Minnesota  
Courtroom 12W  
2:37 p.m.  
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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL  
UNITED STATES MAGISTRATE JUDGE

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22 Proceedings recorded by mechanical stenography;  
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## P R O C E E D I N G S

(2:37 p.m.)

THE COURT: Please be seated. Can the phone participants hear us?

MAGISTRATE JUDGE NOEL: Can you hear us on the phone? Hello telephone people. Can the people on the phone hear us?

THE COURT: They're probably talking. It's like one of those death penalty cases. They just can't hear us.

MAGISTRATE JUDGE NOEL: Can you hear me now?

MR. GORDON: I heard some background noise a minute ago and then maybe we lost them.

MAGISTRATE JUDGE NOEL: Can you hear me now?

UNIDENTIFIED VOICE: Yes.

THE COURT: All right. We have the joint proposal on what we ought to talk about today. Let's just run through that, shall we?

The discovery dispute was a big one, and we already talked about that. So the proposed Plaintiff Fact Sheet, it looks like we do not have issues remaining on that that need to be decided, is that correct?

MR. GORDON: That's correct, Your Honor. We did reach agreement on the substance of the fact sheet. And I believe we've reached agreement now on the process for service.

1 MS. AHMANN: Not completely final, but we're  
2 getting there.

3 THE COURT: Okay. The time, the deadline was  
4 August 26th or so, wasn't it?

5 MS. AHMANN: I can attest that we have been  
6 diligently meeting and conferring and going back and forth.  
7 We are 99 percent there, but we need to get it finalized as  
8 to not the Plaintiff Fact Sheet itself is good. What we're  
9 working on is the process primarily of deficiencies and how  
10 those are going to be handled.

11 THE COURT: Okay.

12 MS. AHMANN: So we're working on a PTO to enter  
13 that. And we're also doing some background work on exactly  
14 how this should be electronically done for secure transfers  
15 and that sort of thing.

16 THE COURT: Okay.

17 MS. AHMANN: That we won't hold up on. We can  
18 follow up, but we do need to get sign off on deficiencies  
19 which we're very, very, close to. We just didn't have time  
20 to finalize it before we came here.

21 MR. GORDON: So, Your Honor, Ben Gordon for the  
22 plaintiffs, pursuant to your agreement last week to give us  
23 an extra week, we did reach agreement on the substance of  
24 the PFS in all respects, so we're happy to report, but I  
25 think the process is just taking a little longer, and we're

1 very close on that.

2 THE COURT: Do you need our input at all? Do you  
3 need any let's just call it "help" from us?

4 MR. GORDON: Honestly, Your Honor, I think we're  
5 going to get there. It's just in their court right now, and  
6 I think we're very close.

7 MS. AHMANN: Yes, we're very close. I don't think  
8 we need any help. It's just a matter of quite frankly of  
9 timing.

10 THE COURT: All right. Thank you.

11 MS. AHMANN: Thank you.

12 MR. GORDON: Thank you, Your Honor.

13 THE COURT: The new schedule we have agreement on  
14 some and not agreement on others.

15 MR. GORDON: Yes, Your Honor. Would you like us  
16 to address that?

17 THE COURT: Yes.

18 MR. GORDON: We halfway -- Ben Gordon for the  
19 plaintiffs again -- suspected we would come in here and you  
20 would have an order for us already as you did the prior  
21 time.

22 But I would agree with you, Your Honor, we do have  
23 an agreement on the proposed for an amended pretrial  
24 scheduling order. The primary areas of disagreement from  
25 the plaintiff's point of view, Your Honor, are very few.

1           Number one, we, as has been mentioned in the past,  
2           we do think a DFS, a Defense Fact Sheet is important, an  
3           important component of this, Your Honor, so we added that to  
4           our list. We're flexible somewhat on the date, of course,  
5           but in every MDL I've ever worked on, we've had a Defense  
6           Fact Sheet. And however brief that needs to be, we can work  
7           on that. But it is the counterpart to the Plaintiff's Fact  
8           Sheet, Your Honor, and we need that in order to prevent the  
9           inefficiency of having to have, at this point, 650 and  
10          eventually thousands of plaintiffs all having to propound  
11          interrogatories about very specific core issues mainly  
12          relating to who their clients are. That is 3M's clients in  
13          terms of the machines that are used on individual  
14          plaintiffs, because when we get into case specific fact  
15          discovery, and we have to make our case and prove our case  
16          with respect to the exposure to a particular machine, we  
17          need that information, and they have that information. The  
18          easiest way for us to get it is for them to answer a very  
19          short Defense Fact Sheet, just like we're doing with the  
20          PFS, Your Honor. So we added that.

21                 The next thing we disagree about the most in this  
22          proposed amended scheduling order is their proposal to cut  
23          off general causation at December 30th. We've added a date  
24          of a very modest extension to January 20th you may see, Your  
25          Honor. That I realize is only three weeks, but it's an

1 important three weeks. As the Court has heard, and there  
2 may be further argument on some of the discovery issues,  
3 there's a lot more to be done on general causation.

4 Importantly, 3M has changed the language, I'm not  
5 sure exactly why, to say "non case specific causation" for  
6 that and moved it up to December 30th. We would urge the  
7 Court to keep it at least to January 20th to give us time to  
8 complete the general causation discovery.

9 The next biggest point of contention I think we  
10 have is that they would like --

11 THE COURT: Mr. Gordon, can you explain the  
12 significance of those three weeks? Is it a holiday issue?

13 MR. GORDON: It's part of that, Your Honor,  
14 exactly. So we think we already are a bit under the gun, if  
15 we're being realistic, to get the general causation  
16 discovery done by the beginning of the year. When you add  
17 to that the holiday season between say December 20th and  
18 January 1st, I think we lose a lot of time there. So I  
19 think most folks are back at work hard by January 2nd, and  
20 to try to cut the process off with a trial date of November  
21 by the end of this year is just unrealistic, and we'll be  
22 coming back seeking more time.

23 I, frankly, think January 20th is pushing it, but  
24 we're willing to live with it. I just want to get as much  
25 time into January as we can to finish the process.

1           The next thing I think we have the most heartburn  
2           about, Your Honor, in their proposal is the proposal that  
3           they get to take the depositions of our experts before they  
4           even disclose their experts. I've never worked on an MDL  
5           where that's been the process. The dates aren't all that  
6           different. Their dates are January 13th. I would point out  
7           that's 14 days after their proposed cut-off for general  
8           discovery for our experts' reports, which I think is again  
9           pretty tight. We're going to need a little extra time then.  
10          So we've proposed March 1st to produce our expert reports,  
11          which still gives us plenty of time to do the rest of the  
12          discovery and prepare for trial.

13                 We've proposed April 3rd for their expert reports,  
14          and then June 2nd for depositions of both sets of experts to  
15          be done. That gives us a 90-day window between March 1st  
16          and June 2nd to do that expert process. Your Honor, they  
17          would ask that we produce our expert reports by January  
18          13th, and a scant 34 days later they depose our experts  
19          before they tell us anything about their experts. And then  
20          they give us their expert reports on March 1st, and we  
21          depose their experts by April 1st.

22                 I think again that's probably unrealistic when you  
23          look at all the schedules of the witnesses and the lawyers  
24          involved to try to get all of that done between January and  
25          March, so we've proposed March to June and ask that they

1 give us their expert reports before they get to depose our  
2 experts.

3  
4  
5 For the most part, the rest of the order is fairly  
6 agreeable. Most items have been expressly agreed to until  
7 you get to number paragraph 20, which is 19 I think on  
8 their's and 20 on ours, on the proposal that we discussed in  
9 court last time for case specific experts for bellwether  
10 cases.

11 We've proposed an approach sort of an answer to  
12 Judge Noel's question last time about this issue of do we  
13 need to have case specific experts of making it an optional  
14 process under which if we believe we need case specific  
15 experts to prove our case and we haven't accomplished that  
16 already, that we have the option of naming those experts  
17 starting in by July 15 of 2017, and then the dates  
18 correspond from there.

19 Their verbiage is a little different, and they  
20 made it expressly experts for selected bellwether cases  
21 beginning that process in May. And, again, asking for their  
22 witnesses' deposition -- their lawyers to be able to take  
23 our experts' depositions before they even disclose their  
24 case specific rebuttal experts. Again, we would think to  
25 the extent there are case specific experts, they should

1 be -- the plaintiff should disclose their's. The defense  
2 should disclose their's, and then we should take the  
3 depositions of both. Those are the primary areas I wanted  
4 to comment on, Your Honor.

5 THE COURT: All right. Thank you, Mr. Gordon.

6 Mr. Blackwell?

7 MR. BLACKWELL: Good afternoon, Your Honors.

8 THE COURT: Good afternoon.

9 MR. BLACKWELL: Everyone. I agree with some of  
10 what Mr. Gordon said. We did agree on most of the dates,  
11 but we do have some fairly significant issues of difference.

12 This issue of the Defendant Fact Sheet is one that  
13 the Court has already addressed. This was raised before.  
14 It was discussed before. It was ruled on before. That  
15 there was no need for the plaintiffs to be requiring a  
16 Defendant Fact Sheet from the defendants when they can  
17 simply ask what they want to ask in discovery. And as Your  
18 Honors have seen already, they certainly have no problems  
19 asking for a lot in discovery. And they can ask that, could  
20 have asked that as well.

21 As to wanting to find out from the defendants  
22 about the particular machine that the plaintiff was using,  
23 that's part of the Plaintiff's Fact Sheet. It's their case.  
24 They're the ones who are claiming that there's a machine we  
25 made that's causing the plaintiff to have a surgical site



1 infection. There is no need to ask us that in Defendant's  
2 Fact Sheet, why would 3M know what particular machine or  
3 unit that the plaintiff was using at a particular hospital?

4 But the point is, and I think this particular  
5 issue previously was argued in fact to Your Honor, Judge  
6 Ericksen, and the response to the plaintiffs, well, you can  
7 ask what you want in discovery. There's not a need for a  
8 Defendant Fact Sheet for things such as information on the  
9 particular machine the plaintiff was using when that is the  
10 plaintiff's burden, since there's got to mean something that  
11 they start a lawsuit claiming that you made a machine that  
12 causes surgical site infection in my client for the  
13 plaintiffs. And that ought to presuppose a couple of things  
14 that in fact you've got some evidence as to the fact they  
15 were using a particular machine, and you can identify what  
16 it was. And you have some good faith basis based upon  
17 competent expert testimony for making that assertion in the  
18 first place just to satisfy requirements under Rule 11. And  
19 that factors into some of our other basic areas of  
20 disagreement.

21 With respect to the initial expert reports where  
22 the plaintiffs would be in favor of some scenario where we  
23 either are -- we're disclosing experts simultaneously. And  
24 I would submit, and I can't speak to Mr. Gordon's  
25 experience. I mean he does quite a lot as a source for what

1 the Court should do based on his experience in MDLs.

2 I've got my own, and I've been in many a case  
3 where in order for the defendant to know what is the case  
4 the defendant is to meet, the defendant is entitled to know  
5 who is going to opine as to the plaintiff's expert, what he  
6 or she is going to say in writing and both in a deposition,  
7 and then you can make an informed decision about what  
8 experts you want to then name as a defendant, and what  
9 opinions they need to espouse. And so all that this  
10 presupposes is a process where the plaintiffs first --

11 MAGISTRATE JUDGE NOEL: Can I ask you a question,  
12 Mr. Blackwell? Can you give me some examples where you've  
13 gone through, where you actually required depositions before  
14 the defendant depositions of the plaintiff's expert before  
15 the defendants even required to identify an expert?

16 MR. BLACKWELL: Yeah, I have, Judge Noel, and  
17 actually in federal courts in many parts of the country  
18 that's been the case where it is viewed the plaintiffs have  
19 the burden of proving their claim with respect to causation.  
20 And in some ways, it seems to save the Court time that  
21 before the defendant discloses, there is a fulsome  
22 understanding of what the plaintiff's assertion in fact is,  
23 and as opposed to having to put up an expert who is sort of  
24 shooting to some extent in the dark.

25 As to what is the basis for the plaintiff's claim

1 then, we couldn't be more in the dark at this point as to  
2 what their basis is for claiming that the Bair Hugger causes  
3 surgical site infections. We didn't get a good sense of it  
4 from science day other than looking at computational flow  
5 dynamics, those animations that the plaintiffs brought in  
6 here, and everything else we've asked them about sort of  
7 what was your basis in making this claim in the first place,  
8 what you should have had when you started the lawsuit.  
9 We've been told every time this is simply premature.

10 THE COURT: Could you just give me a second?

11 (Off the record Court discussion.)

12 (In open court.)

13 MAGISTRATE JUDGE NOEL: All right. Let me just  
14 ask one other question on that expert issue. So my  
15 understanding of the current pretrial order number 4 is  
16 initial expert reports and disclosures are due on December  
17 1st of 2016. And that by "initial expert," I understand  
18 that to be any expert witness that a party is going to call  
19 to testify about an issue as to which that party has the  
20 burden of proof. So under these circumstances, nearly all  
21 of the initial experts presumably would be on the  
22 plaintiff's side. Although, I suppose if there's some  
23 affirmative defense you pled or something that you, the  
24 defendant, has the burden of proof on some issue and wants  
25 to call an initial expert, you would have to meet that. But

1 the rebuttal experts then would be experts who are going to  
2 be testifying in rebuttal to whatever initial experts have  
3 been disclosed; is that your understanding?

4 MR. BLACKWELL: That is my understanding, Your  
5 Honor. That is. And, again, everything I said was sort of  
6 premised on the idea that we would first be able to discover  
7 what opinions the plaintiff's experts are affirmatives  
8 espousing and to understand what they are and what the basis  
9 for those opinions are and have an opportunity to explore  
10 them.

11 THE COURT: You mean to take to their --

12 MR. BLACKWELL: Take the depositions.

13 MAGISTRATE JUDGE NOEL: I guess my only thought on  
14 that is ever since I was a lawyer and sort of followed the  
15 adage about the best defense being a good defense, so that  
16 defendants, even though they responding to things, they are  
17 working right away from the beginning and are preparing  
18 their case and, presumably, are retaining their experts and  
19 sort of getting geared up. And so I don't, I guess it  
20 surprises me, which was more of my question, I've never seen  
21 a case where a defendant has actually been given the  
22 opportunity to depose the plaintiff's experts before they  
23 even have to identify their own experts, because my sense is  
24 good defense lawyers probably already have their experts on  
25 retainer or at least identified for themselves so that

1       they're ready to go when the time comes. So --

2               MR. BLACKWELL: And we obviously have them, and I  
3 understand, Your Honor, that I'm swimming upstream on this  
4 one, based on Your Honor's own experience, I understand  
5 that. I have many cases where I have been allowed to do it,  
6 and we, obviously, you've seen from science day have in mind  
7 certain experts and what they may say.

8               MAGISTRATE JUDGE NOEL: And I understand that  
9 you're deposing a bunch of folks from around the world.

10              MR. BLACKWELL: Yes.

11              MAGISTRATE JUDGE NOEL: Who have written articles  
12 that plaintiffs have been relying on, so you'll have a  
13 better sense after that, I would assume, of what their case  
14 is based upon.

15              MR. BLACKWELL: Except they haven't said they  
16 necessarily are relying on those motions. Those are  
17 depositions that we have noticed, Your Honor.

18              MAGISTRATE JUDGE NOEL: Right, that you've  
19 identified those folks to depose because they've written  
20 articles, right, on this topic?

21              MR. BLACKWELL: Right, but still, again, there is  
22 an over-arching kind of issue and question in the case as  
23 to, you know, what the good reliable science says that this  
24 forced air warming device causes surgical site infections,  
25 and whether there's a reliable scientific methodology for

1 ruling out the other causes. And what their experts are  
2 going to say in that regard and what the basis for those  
3 are, we just don't know. Completely in the dark. But  
4 you've heard the position on that.

5 THE COURT: This is maybe, well, anyway, I'm not  
6 going to preface it. Do the rules allow you to reserve time  
7 if you were desperate to take a deposition after you got the  
8 -- could you reserve some hours of your deposition time?

9 MR. BLACKWELL: Well, there isn't a rule that  
10 precludes it. It would probably be a matter that we'll have  
11 to take up with Your Honors to permit it.

12 THE COURT: Well, if it wasn't going to make it go  
13 over your maximum number of hours. I mean would it be  
14 impossible for you to do it if you decided that that was  
15 necessary?

16 MR. BLACKWELL: It would not be impossible, no,  
17 Your Honor.

18 MAGISTRATE JUDGE NOEL: I'm not sure if I'm  
19 understanding the Court's question correctly. Could you, I  
20 think what Judge Ericksen is asking is could you notice a  
21 deposition of a plaintiff's expert before you disclose your  
22 experts? Ask a certain number hours of questions but not  
23 use your full seven, and then come back and finish after  
24 you've reviewed all the other reports in the case?

25 MR. BLACKWELL: Yes, Your Honor, certainly that

1 would be agreeable to us, and I'm also certain that that  
2 would be an issue that the plaintiff's would raise to the  
3 Court. Their position would be you're one and done, and  
4 we'd have to have an argument around it. I'm certain of it,  
5 you know, but that would be one approach.

6 I mean it will all come out in the wash.  
7 Ultimately, in any event, we'll get at it. But the idea  
8 here was that if they're going to be Daubert motions,  
9 ultimately, on questions of, first, general causation, which  
10 is non case specific. It's across the board. Do you have  
11 any good science being able to prove that this device causes  
12 surgical site infections? And can you rule out through any  
13 reliable methodology other known causes? It's a general  
14 question. And we know that that is initially the biggest  
15 question in the case. It has been from the beginning, and  
16 we went through science day and still is, so we wanted to  
17 make sure there's fulsome discovery and an opportunity to  
18 explore all of the opinions such that we have meaningful  
19 Daubert motions and hearings. So that was the idea there.

20 But our proposed Daubert date is May 1 of 2017.  
21 They proposed June 15th, but we figured by this time, we've  
22 given the discovery that would have taken place in the case,  
23 they had the burden that the plaintiffs should have had to  
24 have proper competent expert testimony before they even  
25 filed the lawsuit. That May 1st should be plenty of time

1 for them to have to come forward to be able to show the  
2 Court what they should have had before they filed the  
3 lawsuit in the first place.

4 Now, we have some disagreement over the case  
5 specific bellwether expert issues. And this was a little  
6 confusing the last time. And, Your Honors, I must confess  
7 to not completely understanding what the plaintiff's  
8 position is because even if they were able to surmount the  
9 hurdle relating to general causation, that there is some  
10 competent, sufficiently competent science to let them get  
11 past the Daubert hurdle in a general sense.

12 There still is the very large question as to  
13 whether or not they can prove that the Bair Hugger was the  
14 cause in the specific case. And that's a whole different  
15 panoply of consideration that will be plaintiff specific,  
16 and you still have the same questions as to whether any  
17 expert who opines that in this specific case it was the Bair  
18 Hugger has an opinion that's based upon competent and  
19 reliable expert facts, opinion. And that will have to get  
20 ferreted out in each individual case because each individual  
21 defendant is different, with respect to the case specific  
22 opinions.

23 So what we set out here for the experts and  
24 selected bellwether cases is to provide some avenue for the  
25 Court to be able to preview the expert opinions, not just



1 preview them but to assess them, on a case specific basis.  
2 And are these competent and reliable expert opinions that  
3 the Bair Hugger was in fact the cause of a particular  
4 plaintiff surgical site infection in light of all of the  
5 other potential risk factors that relate to a specific  
6 plaintiff. And so we set that out. I think we're entitled  
7 to challenge those specific expert opinions because they're  
8 different from general opinions.

9 MAGISTRATE JUDGE NOEL: Just to be clear though,  
10 as I understand the current pretrial order, number four,  
11 that's not a line item in the current schedule; is that  
12 correct?

13 MR. BLACKWELL: That is correct, Your Honor. It  
14 is correct, and it was initially raised the last time we  
15 were here because it wasn't there. And in any event, if we  
16 ultimately felt that the plaintiff's experts were giving  
17 plaintiff specific opinions that weren't real grounded or  
18 founded and raised questions that are separate and different  
19 from general causation questions, we would be back before  
20 Your Honors in any event in that regard to raise those  
21 issues just with respect to Your Honors gatekeeping function  
22 if the experts' opinions need to be challenged.

23 And so the rest of this you'll see here we set up  
24 a hearing data, a proposed one of September 12 of 2017, for  
25 Daubert motions on any case specific experts with respect to

1 the bellwhether at the very end. So we proposed a date for  
2 those case specific expert assessments.

3 So that's how we're seeing the schedule. And I  
4 think a fundamental divide is that we are working, I think,  
5 pretty feverishly to get the question, the general causation  
6 question up to the decision line as soon as possible. And  
7 our view is that largely they should have had most of this  
8 assembled before they made the claim in the first place, and  
9 so that to need, um, kind of well into 2017, or answer all  
10 of our discovery requests about the basis for their  
11 assertions is simply premature when they started a lawsuit  
12 and made the assertions a problem. And so that's the  
13 fundamental thing. And then fundamentally making sure that  
14 we've got -- we attempted to have something built into the  
15 schedule where we get to also challenge case specific expert  
16 opinions to the extent they're different from the general  
17 causation opinions. Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. GORDON: Your Honors, may I respond briefly?

20 THE COURT: Go ahead.

21 MR. GORDON: Thank you. I'll try to be very  
22 succinct. Ben Gordon again for the plaintiffs.

23 So four main areas I would like to respond to, if  
24 I could. First, as to the timing issue, I did want to add  
25 to Your Honors inquiry earlier concerning the holiday issue,

1       which I think is one of the issues that it has taken us a  
2       full seven months up to this point to get the level of  
3       production, and I've realized we've had some squabbles along  
4       the way, but we're seven months into it to get where we are  
5       at this point, and I just think that trying to get finished  
6       by the end of the year is going to be a tall order, and I  
7       want to make sure we have as much time as we can to complete  
8       that part of the case. I think getting into January  
9       hopefully will allow us to do that.

10               Number two, on this DFS issue, I probably didn't,  
11       I wasn't as clear as I could have been before. I'm not  
12       talking about just meeting our burden of proof to show the  
13       Court that a particular plaintiff has been impacted by a  
14       particular machine. We have to meet that burden, and we are  
15       doing that through the medical records to the extent that's  
16       possible. Most of the time it is.

17               But in terms of the relationships that the  
18       defendant has with the suppliers of these machines, many  
19       times the hospitals don't even own the machines, but they  
20       know who do. 3M will lease the machines to them or give the  
21       machines to them, and we don't have that information from  
22       the third parties. Now, yes, we can do third party  
23       discovery, and we're doing it. We think it would be like it  
24       is in most MDLs much more efficient to have 3M who has that  
25       information, it's not burdensome, supply that information to

1 us in the form of a very brief and easy to complete Defense  
2 Fact Sheet.

3 And I will tell you for what it's worth, Your  
4 Honors, that Judge Davis has done that in an MDL here in  
5 this district. Judge Frank has done it in Guidant and  
6 Stryker. Judge Rosenbaum did it in Medtronic. Judge  
7 Tunheim has done it in Levaquin and recently in the  
8 Fluoroquinolone case. In each case, these judges have  
9 ordered the defendants to produce a Defense Fact Sheet.

10 How burdensome it has to be and what's in it, we  
11 can talk about it. We can work that out, but it doesn't  
12 have to be an act of Congress to get that done. It can be a  
13 very short one or two page form.

14 MAGISTRATE JUDGE NOEL: Mr. Blackwell correct that  
15 the Defendant's Fact Sheet was not a line item in the  
16 original pretrial order number 4?

17 MR. GORDON: Yes, Your Honor, Judge Ericksen shot  
18 us down on that. He's correct on that.

19 THE COURT: So you still have the ability to ask  
20 for that in discovery as we discussed a while ago.

21 MR. GORDON: Yes, Your Honor. We can ask, but it  
22 will be serial discovery for each plaintiff case  
23 specifically in their case unless you're suggesting, Your  
24 Honor, that we can ask you for a Defense Fact Sheet,  
25 separate and apart from the -- I understand you said we can

1 propound individual interrogatories or a request to produce  
2 in each and every plaintiff's case as we're doing. And to  
3 the extent that the MDL, the purpose is for the MDL to be  
4 efficient and streamlined, we're trying to use the DFS for  
5 that reason, just like we're doing the PFS, Your Honor.  
6 Same rationale as the Plaintiff's Fact Sheet to try to  
7 minimize the burden on all the parties and the Court.

8           Number three, with respect to the issue of the  
9 timing of the depositions, I don't want to beat a dead horse  
10 on that, Your Honors, but they're going to have our expert  
11 reports. So for Mr. Blackwell to stand up here and say  
12 they're not going to say what their experts are going to say  
13 I just don't think is fair. They're going to have very  
14 thorough going Rule 26 reports. They're going to know what  
15 those witnesses will say. They were here at science day.  
16 They have the experts.

17           Mr. Blackwell stood up here at science day and  
18 made a big deal of the fact that he believes our entire case  
19 is predicated on all of these studies for whom the authors  
20 are being deposed very soon. So they know what our experts  
21 are going to say, and they will certainly know by the time  
22 we give the Rule 26 reports.

23           Finally, Your Honors, on this issue relating to  
24 timing of the fact specific discovery, I think Mr. Blackwell  
25 is conflating a couple of issues, and it's not something we

1       briefed for the Court yet, but I think we're going to have  
2       to, he's right, at the Daubert stage.

3               But the idea that we have to as plaintiffs prove  
4       that in each and every case the Bair Hugger was the sole  
5       cause or to the exclusion of each and every individual cause  
6       I think he said is ludicrous. That's not the law, Your  
7       Honors. It's not the law in this district. I don't think  
8       it's the laws in any district that I'm aware of.

9               The law says that we have to prove that the Bair  
10       Hugger was a substantial contributing factor in the  
11       development of their disease. And it's my belief at this  
12       time that with our general experts and the evidence that  
13       we're going to proffer to the Court before we get to this  
14       final bellwether stage after the bellwethers are selected,  
15       we're going to have that proof, and we're going to have to  
16       produce that proffer before the Court. And we will win  
17       those Daubert motions based on the general causation experts  
18       that we have.

19              That said, to have the ability to come in in each  
20       case and produce additional experts, we embraced it because  
21       Mr. Blackwell actually put it in his brief last time. The  
22       reason it wasn't before the Court until then is because Your  
23       Honors didn't put it in the original pretrial scheduling  
24       order, and we think that's appropriate under the law. We  
25       think we can prove our case without it, but if we're going

1 to have the opportunity, and the defense wants the  
2 opportunity at our election to produce initial experts to  
3 say we have case specific additional experts to prove that  
4 each and every case was specifically related to the machine,  
5 then we'll do that. But we don't think it's our burden to  
6 do that. We don't think we have to do it under the law in  
7 this jurisdiction.

8 As to timing, the final thing I'll say is the  
9 reason we put June in for the timing in terms of the Daubert  
10 reports and all is because if the Court accepts our sort of  
11 expert discovery window which runs from roughly March to  
12 June, that will put the expert issue, the Daubert issue  
13 right in the middle of that window, and we believe the Court  
14 would rather have that discovery complete and the parties in  
15 order to have the Daubert motions heard then after that, so  
16 we put June 15th. Thank you.

17 MAGISTRATE JUDGE NOEL: Thank you.

18 MR. BLACKWELL: Could I have a minute to respond,  
19 Your Honor?

20 THE COURT: Just a second. June 15th was the  
21 original date. That's in the --

22 MR. GORDON: I don't have the original order, Your  
23 Honor. It may be. We did submit a red line. You're right,  
24 Your Honor. We left that unchanged.

25 THE COURT: Mr. Blackwell.

1 MR. BLACKWELL: Your Honor, just briefly, in the  
2 event I need to respond to this DFS issue further or at all,  
3 I still don't quite get it. I mean to the extent they're  
4 saying that they need discovery from 3M as to which  
5 hospitals where the Bair Hugger unit may have been sold, the  
6 plaintiff's lawsuit started claiming that the plaintiff used  
7 a 3M Bair Hugger in a specific hospital or facility. That's  
8 already in their Plaintiff's Fact Sheets.

9 So I don't know what exactly they're looking for  
10 from us that they don't presumably already have in that  
11 regard. It's how they're claims begin claiming that there  
12 was a Bair Hugger used in a specific hospital and it caused  
13 injury. And so it's still not clear to me what it is they  
14 would be looking for in a DFS.

15 And we will be back before the Court with respect  
16 to the discovery. And I think we have something to submit  
17 to the Court tomorrow on our outstanding discovery issues  
18 and the chart, and I'll just defer that to bring up those  
19 issues then and there, but we certainly don't want to have  
20 to wait until we get the plaintiff's expert reports to  
21 understand completely what the basis is for the claims that  
22 they have made, meaning that we get no other discovery  
23 before then about what it's about. And science day wasn't  
24 that. They didn't discuss really one scientific study on  
25 science day.



1           So, and, Your Honor, I'll defer then discussions  
2           also about what causation is and how it will be defined to  
3           an appropriate point in the case, but substantial  
4           contributing factor should raise eyebrows already. I mean  
5           this isn't akin to a dose dependent disease. I mean so  
6           either the Bair Hugger introduced bacteria that caused the  
7           infection or it did not. And it can't have done it just a  
8           little bit, and so either it did or it didn't.

9           So we're going to have a real argument over that  
10          in terms of what causation means, but I'll defer that to the  
11          appropriate time.

12          THE COURT: All right. Well, we will issue an  
13          order resolving these various positions with respect to the  
14          pretrial order. And let's see what else we have to decide.

15          Amended master complaint and answer.

16          Okay. The next status conference is October 13th,  
17          right? And I have that as being at 9:30 in the morning?

18          MR. GORDON: Thanks, Your Honor. I think we  
19          requested that, and we appreciate that, Your Honor.

20          THE COURT: Now, going forward from November on,  
21          will you similarly not like 2:00? You will similarly not  
22          like 2:00. What's the best --

23          MR. GORDON: Yes, Your Honor. I think we had  
24          mentioned last time we were hopeful for a lot of the parties  
25          who or the lawyers who fly in and fly out that if we can

1 continue to do them in the morning after October, it doesn't  
2 have to be as early as 9:30, but the morning is better if  
3 possible.

4 MR. BLACKWELL: And we are simply models of  
5 cooperation and flexibility.

6 THE COURT: All right. We'll take a look at our  
7 schedule. I don't think that's going to be a problem.

8 MR. GORDON: Thank you, Your Honor.

9 THE COURT: Anything else?

10 (Off the record Court discussion.)

11 (In open court.)

12 MAGISTRATE JUDGE NOEL: Okay. So with regard to  
13 the argument we had earlier regarding the status of the  
14 custodians, Mr. Hulse, we're going to ask you to submit to  
15 us and give to the plaintiff the list of the 25 custodians  
16 you interviewed that you describe in your memo and identify  
17 them by name, title, and brief job description. And if you  
18 could get us that say by close of business tomorrow, I can  
19 enter an order by Monday as to what we're going do on that  
20 issue.

21 MR. HULSE: Thank you, Your Honor. I would have  
22 had it sooner, but it's something I just need to pull  
23 together in a form the Court can use.

24 MAGISTRATE JUDGE NOEL: Okay. That's all I have.

25 THE COURT: That's it. All right. We're in

1 recess.

2 MS. ZIMMERMAN: Your Honor, if we could, we have,  
3 I think, one last issue on this.

4 THE COURT: All right. Please be seated. Court  
5 is in recess. In out of recess. We're reconvened.

6 MS. ZIMMERMAN: Thank you, Your Honor. With  
7 respect to, I think, it's the last item on the agenda. As I  
8 think the Court is aware, we have some depositions starting  
9 in the UK next week. I think that we're working together  
10 with respect to some confidentiality issues and the use of  
11 potential documents with some of these witnesses, but it's  
12 possible we may need the Court's involvement even in advance  
13 of that, and I think the first deposition is the 15th.  
14 We're working on it this morning yet.

15 In addition, we had said or we had at the last  
16 status conference requested potential insight from the Court  
17 on how we might bring potential disputes. Right now the  
18 depositions in the UK are set to go forward on the 15th.  
19 There are two back-to-back depositions on the 17th in London  
20 and then one on the 22nd, and I don't know what the Court's  
21 instruction or preference might be about how to approach the  
22 Court for any issues.

23 MAGISTRATE JUDGE NOEL: Issues that arise during  
24 the course of the deposition itself?

25 MS. ZIMMERMAN: Yes, Your Honor.

1 THE COURT: What do you propose?

2 MS. ZIMMERMAN: Well, that's a good question. The  
3 time zone makes it a little bit difficult. I know that  
4 there is at least one deposition. I think two that are  
5 happening in the afternoon in the UK, so perhaps the time  
6 zones may not be as significant of an issue. And hopefully  
7 this doesn't become an issue, but in the event that we need  
8 to seek court intervention on something, we'd like to --

9 THE COURT: What are the dates again of your  
10 depositions?

11 MS. ZIMMERMAN: September 15th. There are two  
12 depositions then on Saturday the 17th, and then another  
13 deposition on the 22nd.

14 THE COURT: And the time zone issue is six hours  
15 between here and the UK?

16 MS. ZIMMERMAN: I believe that's correct, Your  
17 Honor. Perhaps we could submit a list of the depositions,  
18 the dates, and the times, and inquire by e-mail how the  
19 Court would like to have it handled.

20 THE COURT: It would be seven hours by then after  
21 daylight savings time. I'm not available those times. I'll  
22 be in Europe. It's not a --

23 MAGISTRATE JUDGE NOEL: You can stop in.

24 MS. ZIMMERMAN: You can come watch.

25 MAGISTRATE JUDGE NOEL: I'm available by

1 telephone. I can't -- your last suggestion is the best,  
2 submit us an e-mail of exactly when these depositions are  
3 scheduled, and in the e-mail, tell us what time it is in  
4 Minnesota. And over that weekend, what time it is on the  
5 west coast.

6 MS. ZIMMERMAN: All right, I will do that. And  
7 lastly, Your Honors, I think that the plaintiffs have  
8 offered to update the Court on the status of depositions for  
9 current and former employees. I believe that we now have an  
10 agreement that November 2nd and November 4th we will go  
11 forward with the depositions of Mr. Hanson and Mr. Rock.  
12 That's all. Thank you.

13 THE COURT: For your depositions on the 15th,  
14 17th, and 22nd, what time on the 15th?

15 MS. ZIMMERMAN: 2:30 in the afternoon in London I  
16 believe.

17 THE COURT: What time is it going to be here?

18 MS. ZIMMERMAN: About 8:00 in the morning. I'm  
19 testing Bridget's memory as well.

20 MS. AHMANN: It starts at 9:00 in the morning.  
21 It's six hours difference. It starts at 3:00. So about  
22 9:00 start.

23 THE COURT: Okay. Well, I'll be available that  
24 morning. But what I was going to ask -- if I have  
25 communication, it will only be Internet-type communication,

1 so maybe there's a phone on the Internet in an emergency,  
2 but it's going to be tough.

3 MS. ZIMMERMAN: We certainly hope to avoid that.

4 THE COURT: Okay.

5 MS. ZIMMERMAN: Thank you.

6 MR. GORDON: Your Honor, may I be heard briefly  
7 before we go back to recess? Very briefly, I promise.

8 I don't want to continue to bring up something  
9 that I know the Court has already heard but my capable  
10 liaison counsel, Dave Szerlag, who deals with all these  
11 issues on the individual plaintiffs who file cases in these  
12 MDLs made a couple of very good points that I did not make  
13 with respect to the DFS, the Defense Fact Sheet. And, you  
14 know, the information we get from the hospital doesn't  
15 contain the implant or the machine identification  
16 information frequently. We don't know empirically the model  
17 number and the other indicia of authenticity of the machine.  
18 Many times the machines are taken out. They're repurposed  
19 by 3M. They're changed up. A lot of time we don't have  
20 that information. And to get it, Your Honor, we're going to  
21 have to take dozens, possibly hundreds of third party  
22 depositions because the hospitals frequently don't know.  
23 They punt this to 3M or whoever services the machine.

24 And so, again, under the heading of efficiency,  
25 and if Your Honors wanted, I could submit to the defense and

1 to you a very short sample of what we're talking about, a  
2 two or three page. We're not talking about a 25-page PFS  
3 like we have, but maybe a two or three page Defense Fact  
4 Sheet, so you could see how sort of benign and within their  
5 kin the information is. It's not a burden on them, and we  
6 think it's done in every MDL, and we appreciate your  
7 considering it.

8 THE COURT: Mr. Blackwell?

9 MR. BLACKWELL: Your Honor, I feel like this issue  
10 is from a Boris Karloff movie, and it's just every time you  
11 think it's down, it rises up again and walks back up to the  
12 podium and starts talking as it just did.

13 I'm not, they can see in the medical records which  
14 plaintiff was claiming to be using a Bair Hugger device.  
15 Their claims are general. The Bair Hugger causes this. It  
16 doesn't depend on serial numbers, any of that. None at all.  
17 They made this up. And as far as I know, what this is  
18 really leading to is for them to simply want 3M to disclose,  
19 you know, where they put Bair Hugger units across the entire  
20 United States of America for purposes of perhaps finding  
21 additional claimants.

22 MR. GORDON: That's outrageous. I object to that.  
23 That's outrageous.

24 MR. BLACKWELL: I don't know. Otherwise, I'm  
25 saying I don't know what this is for. But, Your Honors,

1       this has been addressed and readdressed I think to the end.  
2       And, Judge Ericksen, I think you've been clear that to the  
3       extent they need information, they can get it through  
4       discovery, if they need it in discovery. And they have no  
5       problems asking for what they need. They've asked for a lot  
6       already.

7               THE COURT: All right. Does anybody have anything  
8       else?

9               MR. HULSE: I have something different, Your  
10       Honors.

11              Thank you. So we have a deadline to submit a  
12       chart of up to four issues to Judge Noel tomorrow. We've  
13       provided our issues to the plaintiffs. And as of the time  
14       that I walked over here, we didn't have a list of issues and  
15       don't know what the plaintiff's issues would be.  
16       Respectfully, our view is that's a bit of a short  
17       turnaround, particularly given that we need to vet  
18       internally and with our client. And so all I wanted to  
19       suggest, Your Honor, is assume that we get their issues  
20       today, that we extend the deadline for submitting the chart  
21       to Your Honor to Monday. One additional day. We just think  
22       that this is likely too short a turnaround on that.

23              MAGISTRATE JUDGE NOEL: Who is addressing that on  
24       the plaintiff's side? Ms. Zimmerman?

25              MS. ZIMMERMAN: Your Honor, if they're asking for



1 an additional day, we got their chart this morning. We're  
2 happy to give them an additional day to Monday.

3 MR. HULSE: The premise of it being that we get  
4 their chart today though. We need to have more than just  
5 getting it the morning of.

6 MS. ZIMMERMAN: We'll work together on that.

7 MR. HULSE: Okay. Can we get --

8 MAGISTRATE JUDGE NOEL: You can get a date.  
9 Tomorrow is Friday, so you want until Monday?

10 MR. HULSE: Can we get direction from the Court  
11 that we'll have their chart by tomorrow morning first thing?

12 MAGISTRATE JUDGE NOEL: What's the status of the  
13 plaintiffs?

14 MS. ZIMMERMAN: We were receiving followup items  
15 to prioritize which of the two to four outstanding issues we  
16 were going to put onto the chart, so we're happy to get that  
17 to the defendants tomorrow.

18 MR. HULSE: Can we do it by 10 a.m. tomorrow  
19 morning? I mean we were supposed to submit it tomorrow, and  
20 it looks like we weren't even going to get this until --

21 MAGISTRATE JUDGE NOEL: Judge Ericksen has been  
22 telling me that she's fascinated to see some of these  
23 discovery disputes that district judges don't often get to  
24 see. We're on a level of minutia that even I haven't seen.

25 THE COURT: Really it's not like this all the

1 time?

2 MR. HULSE: Your Honor, we just need to know what  
3 their issues are and have time to prepare our response and  
4 vet it with our client and so forth.

5 THE COURT: Why don't you make them have a fight  
6 now?

7 MS. ZIMMERMAN: We'll get it to them by 10:00  
8 tomorrow morning.

9 MAGISTRATE JUDGE NOEL: Call it 10:00, and we'll  
10 look for your joint chart on Monday to me.

11 MR. HULSE: Very good. Thank you, Your Honor.

12 MAGISTRATE JUDGE NOEL: Okay, thank you. Now,  
13 we're in recess.

14 (Court adjourned at 3:23 p.m.)

15  
16 \* \* \*

17  
18 I, Maria V. Weinbeck, certify that the foregoing is  
19 a correct transcript from the record of proceedings in the  
20 above-entitled matter.

21  
22 Certified by: s/ Maria V. Weinbeck

23 Maria V. Weinbeck, RMR-FCRR  
24  
25